THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WESTERN CHALLENGER, LLC, Plaintiff, v. DNV GL GROUP, *et al.*, Defendants.	CASE NO. C16-0915-JCC ORDER DENYING MOTION TO COMPEL

This matter comes before the Court on Defendant's motion to compel (Dkt. No. 55). Having thoroughly considered the parties' briefing and the relevant record, the Court DENIES the motion for the reasons explained herein.

I. BACKGROUND

Plaintiff sought a tender for its Alaskan fishing operations. (Dkt. No. 33 at 2.) It engaged DNV Group, Germansicher Lloyd (USA), Inc., Don Seymour, Phil Essex, and Moorsman Consulting Group, LLC (collectively "Defendants") to advise in purchasing the vessel and to assist in acquiring the tonnage certificate needed for the endorsements necessary to operate it as intended. (Dkt. No. 33 at 2–4.) Plaintiff also engaged Kim Marine, not named as a defendant, to provide documentation for the vessel. (Dkt. Nos. 55 at 2, 57 at 2.) Based on Defendants' advice, Plaintiff acquired the vessel and made certain modifications. (*Id*.) Despite Defendants' assistance, Plaintiff has been unable to acquire the required endorsements. (*Id*.) Plaintiff brings

suit for negligence and breach of contract. (Dkt. No. 33 at 4–5.)

Plaintiff listed Kim Marine's owner, Heung Kim as a fact witness in its initial disclosures to Defendants. (Dkt. No. 56-1 at 3.) Defendants subpoenaed Kim Marine's records and deposed Kim. (*Id*.) At issue are five emails Plaintiff's attorneys sent Kim. According to the privilege log that Plaintiff produced, Plaintiff withheld them from production on the basis of "[w]ork-product, attorney-client privilege." (Dkt. No. 56-5 at 2.) Defendants believe no privilege applies to these emails and asks the Court to compel production. (Dkt. No. 55.)

II. DISCUSSION

Plaintiff asserts the emails are subject to both the attorney-client and work-product privileges. (Dkt. No. 57 at 2.) As discussed below, the Court finds that Plaintiff has met its burden in establishing that the emails are work-product.[1] Therefore, the Court need not decide whether the emails are also subject to the attorney-client privilege.

According to Federal Rule of Civil Procedure 26(b)(3)(A), attorney work-product need only be produced in limited circumstances. The primary purpose of the rule is to "prevent exploitation of a party's efforts in preparing for litigation." *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1494 (9th Cir. 1989). But the court will not allow a party to withhold "relevant and non-privileged facts [that] remain hidden in an attorney's file." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

Defendants assert Plaintiff cannot claim work-product protections for discussions between Plaintiff's attorney and Kim because neither the facts known to Kim nor Kim's opinion are covered by the work-product rule. (Dkt. Nos. 55 at 4, 61 at 3.) Defendants' argument misses the mark. Plaintiff alleges the emails contain *counsel's* opinion, not Kim's. (Dkt. No. 57 at 2.) This is protected work-product. *See Republic of Ecuador v. Mackay*, 742 F.3d 860, 869 (9th Cir. 2014) (work-product containing counsel's opinion receives the highest protections).

[1] Defendants do not meaningfully argue that production of the emails is required based on Defendant's substantial need. *See* Fed. R. of Civ. P. 26(b)(3)(A)(ii).

Defendants further assert that even if counsel's opinion would normally be protected work-product, counsel waived any protection when counsel disclosed thoughts and opinions to Kim. (Dkt. No. 61 at 5.) The Court disagrees. Voluntary disclosure of work-product to a third party does not waive the work-product protection unless such disclosure enables an adversary to gain access to the information. Wright, Miller, Kane & Marcus, 8 FED. PRAC. & PROC. CIV. § 2024 (3d ed.).While the Ninth Circuit has not weighed in on this issue, other courts have, and they agree that waiver requires more than mere disclosure to a third party. *See Sugar Hill Music v. CBS Interactive Inc.*, CV 11-9437 DSF(JCX), slip op. at *8 (C.D. Cal. Sept. 5, 2014) (summarizing decisions on the issue outside of the Ninth Circuit).

The party resisting discovery bears the burden to show that its documents are protected by privilege. *Everest Indem. Ins. Co. v. QBE Ins. Corp.*, 980 F. Supp. 2d 1273, 1277 (W.D. Wash. 2013). Further, if the privilege at issue is work-product, the party must also establish that the documents at issue were prepared in anticipation of litigation. *See, e.g., Heath v. F/V ZOLOTOI*, 221 F.R.D. 545, 549 (W.D. Wash. 2004); *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 507 (S.D. Cal. 2003). Plaintiff asserts that Kim "possesses a significant volume of information that effects [legal] strategy, creating the necessity for Plaintiff's counsel to consult with him regularly in prosecuting Plaintiff's claims. (Dkt. No. 57 at 2.) Moreover, Plaintiff points out that the emails at issue all occurred around key litigation dates. Counsel sent the first four emails in the two months leading up to Plaintiff filing suit. (*Id*.) Counsel sent the fifth and final email the day Plaintiff filed its Amended Complaint. (*Id*.) Plaintiff's affirmative statements, coupled with the nature of the communications at issue, are sufficient for the Court to conclude Plaintiff has met its burden in demonstrating that the emails in question contain information related to this litigation.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to compel (Dkt. No. 55) is DENIED.

DATED this 2nd day of November 2017.

John C. Coughenour
UNITED STATES DISTRICT JUDGE